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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services	)	CC Docket No. 92-115

To: The Commission

COMMENTS OF APPLICANTS AGAINST LOTTERY ABUSES

APPLICANTS AGAINST LOTTERY ABUSES

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SUMMARY

In these Comments, Applicants Against Lottery Abuses ("AALA") urges the Commission to make the following modifications to its proposed revision of the Part 22 rules and associated FCC Forms:

(1) Modify the Instructions to proposed new FCC Form 401 to affirmatively direct applicants to provide the exhibit called for by proposed new Sections 22.953(a)(5)(v) and 22.108. This language should make specific reference to these Rule sections;

(2) Decline to adopt proposed new Rule Section 22.129.

Given the proposed elimination of many questions contained in the present FCC Form 401 pertaining to ownership information, modifying the Instructions to proposed new FCC Form 401 as suggested herein will ensure that applicants are on notice of their obligations to provide full disclosure of the real parties in interest to their applications, and will better enable the Commission to hold applicants accountable for failures to provide this information.

Moreover, the Commission's proposed blanket limitations on payments for the withdrawal of petitions to deny and mutually exclusive applications would remove the incentive for private parties to undertake the necessary and often substantial task of assisting the Commission in policing lottery abuses. AALA urges the Commission instead simply to deny, on a case-by-case basis, payments from settlements that stem from frivolous petitions.

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COMMENTS OF APPLICANTS AGAINST LOTTERY ABUSES

Applicants Against Lottery Abuses ("AALA"), by its attorneys, hereby submits these comments in response to the Commission's Notice of Proposed Rule Making in the captioned proceeding, 7 FCC Rcd 3658 (1992) ("NPRM"). In these comments, AALA urges the Commission to:

(1) Modify the Instructions to proposed new FCC Form 401 to make specific reference to the information called for by proposed new Rule Sections 22.953(a)(5)(v) and 22.108. This will put all cellular applicants on unambiguous notice that they must disclose fully the real parties in interest to their applications;

(2) Decline to adopt proposed new Rule Section 22.129. Adopting such a rule would seriously debilitate or eliminate the efforts of "private attorneys general" to assist the Commission in policing abuses of its cellular lottery rules -- virtually assuring that many such abuses will go undetected in the future.

Introduction

1. AALA is a coalition of applicants for non-wireline facilities in RSA markets. AALA is committed to assisting the Commission in ensuring the integrity of the Commission's cellular lottery processes by petitioning the Commission to deny the applications of parties involved in lottery-skewing schemes. Most recently, AALA played a central role in discovering and prosecuting a scheme in which some 23 RSA tentative selectees and permittees became signatories to one of two "Mutual Contingent Risk-Sharing Agreements." See Algreg Cellular Engineering et al., CC Docket No. 91-142.[1/] The efforts of AALA and other "private attorneys general" in prosecuting abuses of the lottery process have been invaluable to the Commission in performing its regulatory role.

1/ Under the "Mutual Contingent Risk-Sharing Agreements," the signatories thereto -- each of whom had applied for 250 to 428 RSA markets -- agreed that in the event a signatory won a lottery and was awarded a license, that signatory would give away 50% of its system's distributed operating profits (or proceeds from the system's sale) to be split among the other Agreement signatories. As a result of petitions filed by AALA and other applicant coalitions, and detailed comments filed in a later investigatory proceeding, the Commission concluded that these Agreements violated numerous Commission Rules, including Section 22.921(b) (prohibiting ownership interests in more than one competing application), Section 22.33(b)(2) (prohibiting partial settlement agreements among competing RSA applicants), Section 22.922(a) (prohibiting pre-grant transfers of interest in RSA applications), and Sections 22.13(a)(1) and 1.65 (requiring disclosure of such agreements). The signatory applicants were designated for evidentiary hearing, and AALA played a major role during some nine months of pretrial discovery, hearing sessions, and preparation of proposed findings of fact and conclusions of law. Administrative Law Judge Walter C. Miller's Initial Decision in the proceeding is expected to be issued later this year.

2. The recommendations detailed below are designed to: (a) ensure that cellular applicants provide sufficient information in their applications to alert the Commission to the possible existence of lottery-skewing schemes such as the "Mutual Contingent Risk-Sharing Agreements;" and (b) protect the roles of those such as AALA, who would undertake the substantial costs of uncovering and prosecuting such schemes, as "private attorneys general" assisting the Commission in enforcing its lottery rules.

Discussion

I. The Instructions to Revised FCC Form 401 Should Specifically Reference the Information Required by New Sections 22.953(a)(5)(v) and 22.108

3. Present Section 22.13(a)(1) of the Commission's Rules requires all applicants to "[d]isclose fully the real party or parties in interest" to their applications. In addition, present Section 22.923(a)(9), pertaining to RSA applications, specifically requires an applicant to provide "[a]n exhibit setting forth the information required by Section 22.13(a)(1)." By requiring full disclosure of the real party or parties in interest to an application, these provisions seek to aid enforcement of the prohibition against simultaneous interests in mutually exclusive applications for the same market, and thereby to prevent the artificial skewing of cellular lotteries by methods such as numerous mutually exclusive applicants granting each other undisclosed reciprocal interests in their applications (as in the Algreq Cellular Engineering case), or the less subtle

mechanism of one controlling party having family members also file applications in that market.

4. The present provisions requiring full disclosure of the real parties in interest to an application are paralleled in the Commission's proposed new rules. Present Section 22.13(a)(1) is incorporated, in virtually identical form, in proposed new Section 22.108. The exhibit requirement of Section 22.923(a)(9) is tracked in proposed new Section 22.953(a)(5)(v), which dictates the content of unserved area applications.

5. Present FCC Form 401 contains a number of questions (Questions 13-17) which, by language referencing "any party to this application" and "any person directly or indirectly controlling the applicant," remind cellular applicants of their obligation to fully disclose full ownership and control information. However, the Commission's proposed revised FCC Form 401 contains just a single item (Question 11) asking for the "[u]ltimate controlling party of the applicant." There is no other reference, in either the application form or the instructions to the form, to an applicant's need under present Section 22.923(a)(9) (new Section 22.953(a)(5)(v)) to provide an exhibit containing the real-party-in-interest information called for by present Section 22.13(a)(1) (new Section 22.108).

6. The absence of any such reference in the application form presents applicants with an opportunity to withhold full real-party-in-interest information and therefore hide abuses of the lottery process. Question 11 of FCC Form 401 itself is not likely to elicit the full information required by the Rules. It

can be expected that in almost all cases, applicants will answer Question 11 of new proposed Form 401 simply by restating the applicant's name. Without at least the exhibit required by new Sections 22.953(a)(5)(v) and 22.108, the application would contain no other information that might call that representation into question, and in any event, Question 11 does not call for disclosure of real parties in interest that might not be the "ultimate controlling party of the applicant." Yet without a reference to the necessary real-party-in-interest information called for by the Rules, applicants could at least colorably claim that they lacked notice that such information was required.

7. This problem can be cured simply by inserting into the instructions to the revised FCC Form 401 language affirmatively directing applicants to provide the exhibit called for by new Sections 22.953(a)(5)(v) and 22.108. This language should make specific reference to these sections. By adding this language to the Form 401 instructions, the Commission will ensure that applicants are on notice of their obligation to provide full real-party-in-interest disclosure, and will be better able to call to task applicants who fail to provide this information.

II. The Commission Should Not Adopt Blanket Limits on Payments for the Withdrawal of Petitions to Deny or the Dismissal of Applications

8. The Commission proposes to adopt a new Section 22.129 which would limit the consideration for withdrawal of a petition to deny a Part 22 application to the petitioner's out-of-pocket expenses (and for withdrawal of a mutually exclusive application

to the applicant's out-of-pocket expenses). This provision, however, will seriously debilitate or eliminate the efforts of "private attorneys general" such as AALA to assist the Commission in policing abuses of its cellular rules, and will virtually assure that many such abuses will go undetected in the future.

9. There is a statutorily mandated opportunity for private parties to assist the Commission in policing abuses of its rules. This mandate not only is expressed in the Communications Act, but is paralleled in other federal laws providing for private rights of action arising out of their violation and awarding treble damages to recompense parties who bring such actions.[2/]

10. Moreover, there is a practical need for the assistance of private parties in enforcing the Commission's rules. This has proven particularly true in the case of cellular lotteries, where there are many hundreds of applicants for each license and hundreds of licenses being awarded in a relatively short period of time. It is just not possible for the Commission to closely examine each winner, particularly when the most egregious abuses of the lottery rules tend to involve multiple applicants on a nationwide scale. While the consideration of petitions does require some of the Commission's time, the effort expended by the Commission to determine the merit of a petition is infinitesimal compared to the effort that would be necessary for the Commission to discover and investigate rule violations itself. Thus, unless the Commission wishes to "let sleeping dogs lie" and allow rule

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2/ See Comments of AALA, CC Docket No. 90-6 (December 16, 1991), at 7-8.

violations to go undetected and unpunished, the petition to deny process is the most resource-efficient approach available.

11. However, the cost to private parties assisting the Commission in cellular licensing matters by filing petitions to deny can be staggering. This is borne out by AALA's experience in the Algreg Cellular Engineering proceeding. In that proceeding, over the course of some nine months, AALA and the Committee for a Fair Lottery ("CFL"), another applicant coalition, took the lead in prosecuting the matter. Expending extraordinary resources and countless hours, AALA/CFL: (1) called and deposed over 60 witnesses from all over the country; (2) sifted through tens of thousands of pages of pre-trial discovery documents; (3) prepared some 400 direct case exhibits; (4) attended full-day hearing sessions for nearly two solid months; and (5) prepared and submitted nearly a thousand pages of findings and reply findings of fact and conclusions of law. An Initial Decision in that case is expected later this year, and AALA expects to spend equally staggering amounts of time and resources litigating the almost certain appeals of that decision. All told, the petitioners in the Algreg Cellular Engineering proceeding will have expended some two million dollars worth of time and expenses in prosecuting the case.[3/]

12. If a party is to undertake the financially devastating task of filing a petition, it must either have assurance that it

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3/ AALA's crucial role in assisting the Commission in the Algreg Cellular Engineering case is further detailed in AALA's December 16, 1991 Comments in CC Docket No. 90-6, the proceeding to formulate rules for processing of cellular applications for unserved areas.

will not suffer a financial loss in filing it, or know that the potential financial gain from a successful petition is high enough to risk losing the amount spent prosecuting it. In broadcast cases, petitions to deny are usually filed by a competitor that will directly benefit if the petition is granted. Thus, the chances of recouping the money spent filing a petition are very good. This is why a settlement limit is more appropriate in the broadcast context: such a limit will not deter most sincere petitioners since the petitioner knows it will reap competitive benefits if the petition is found to be meritorious.

13. Unfortunately, what is true for broadcasting is not true in Public Mobile Service lotteries. Unlike in the broadcast context, where a petition to deny can be filed for as little as a few hundred dollars, petitions to deny Part 22 lottery applications (particularly those involving far-ranging and systemic schemes like that involved in the Algreg Cellular Engineering proceeding) are typically far more complex and expensive to produce, often costing tens of thousands of dollars for each pleading. When the amount expended on a petition is small, a petitioner can afford to take the chance that it will never see that money again. Given the cost of Public Mobile Service lottery petitions, no one can afford to throw that amount of money away without some assurance of repayment. However, for a Public Mobile Services applicant, filing and successfully prosecuting a petition to deny the application of the tentative selectee does not lead to direct competitive or financial

benefit. Instead, it merely allows the applicant a re-lottery where it will have a 1 in 1000 chance of being selected as the permittee.

14. Since the Commission has no "private attorney general" fund to reimburse every petitioner for its reasonable expenses and thus cannot assure petitioners that they will be reimbursed, and since, as discussed above, the chances of recouping petition expenditures by winning a re-lottery are miniscule, only one possibility remains: a potential petitioner must depend on the likelihood of a settlement as a way of counter-balancing the difficulty and expenditure of a petition. The Commission's proposal to limit petitioners to their out-of-pocket expenses therefore would be a tremendous disincentive to the filing of meritorious petitions, as the best a petitioner can hope for under such circumstances is a small chance of recovering its costs. The rest of the time it will lose its entire expenditure of time and money.

15. In proposing to limit settlements for both applicants and petitioners to their reasonable costs, the Commission appears to have lost sight of its pragmatic reasons for allowing such settlements in the past. As outlined above, petitions to deny are an integral and statutory part of the application process. However, recognizing that petitioners cannot reasonably finance and prosecute a petition that will yield no benefit to the petitioner (since it will not result in competitive gain or a financial return on the effort), the Commission seems intent upon defeating the effectiveness of the statutorily required

petitioning process by maintaining only the opportunity to file a petition, and eliminating any reason for a party to do so.

16. In effectively squelching all petitions to deny, the Commission has adopted what at first blush appears to be the morally high ground: wrongdoers should not profit from their deeds, and petitioners should not profit from being paid by a wrongdoer to go away, thereby leaving the wrongdoer with an FCC license. AALA completely agrees with both of these propositions, but finds them largely irrelevant to the issue of cellular settlements. This is simply because the Commission's understanding of how the petition settlement process works is erroneous.

17. If an applicant clearly violated the Commission's rules and a petition was filed against it, the Commission would be correct in not granting the applicant an FCC license or allowing the wrongdoer to profit in any other way. This is true whether or not the applicant paid the petitioner to withdraw the petition. Once the issue is raised by a petitioner, the Commission has been made aware of it and can pursue it as it sees fit, whether or not the petition is subsequently withdrawn. If the applicant has clearly violated the Commission's rules, then the application can be quickly denied and the wrongdoer will not profit from its application. Whether a petitioner should be allowed to profit in such a scenario by withdrawing its petition and leaving the matter to the Commission is largely an issue of whether the Commission feels it important to encourage parties to bring all relevant information to its attention prior to making a

licensing decision. This is often a moot question since an applicant without a license will rarely have any way of paying a petitioner.

18. Realistically, however, the Commission rarely has to worry about how to treat such a settlement proposal since cellular settlements are rarely structured as described above. First, a rule violation is rarely obvious. Instead, a petitioner will typically have access only to information strongly suggesting a rule violation, or, if the facts are undisputed, the question of a rule violation will be governed by the Commission's interpretation of its rules. In either case, the Commission, the petitioner, and the applicant will have to expend additional resources in the discovery of additional facts or in debating the correct interpretation of the rules.

19. At this stage of the process, there is no obvious wrongdoing, but merely the possibility of wrongdoing. All of the parties recognize this, including the Commission, and all parties realize that they will have to expend significant additional resources to determine whether a rule violation occurred. Indeed, the Commission is obligated to expend these resources to ensure that licensing of the applicant will not violate its public interest mandate. It is at this point in the process that the Commission and the parties must make the pragmatic decision as to whether to pursue the matter to the end or seek an efficient solution.

20. If the applicant can receive nothing but its expenses for dismissing its application, then it is almost certain to

continue prosecuting its application even if there is only a small chance of succeeding in persuading the Commission that the questioned activity is not violative of the Commission's rules. Without settlement, the Commission is then obligated to expend its resources to prosecute the matter to determine whether a rule violation occurred. If, on the other hand, the applicant is allowed to accept an amount that is significantly more than its expenses but less than the fair market value of the license, it may decide, quite independent of whether or not it committed a rule violation, that the settlement is a far better option than enduring the expense and delay of a Commission inquiry. Settlement is therefore not a matter of a wrongdoer making a profit, but of the Commission and the parties reaching an agreement that the expense and delay of making a determination as to wrongdoing is harmful to the Commission, the parties and the public.

21. For example, in the Algreg Cellular Engineering proceeding, the first petition to deny was filed in late 1989, and now, almost three years later, the parties are awaiting an initial decision that is almost certain to spend another few years on appeal. In the meantime, the public in the RSAs involved have yet to receive cellular service from the non-wireline applicants because no construction permit can yet be issued. This lengthy delay in service has benefitted no one, and the laudable desire to ensure that confirmed wrongdoers do not profit from their actions can hardly justify the delay in service.

22. By entering into a settlement where a fully qualified third party agrees to pay the petitioner to withdraw its petition and to pay the applicant to remove itself as a potential licensee in return for a grant of the license to the third party, the applicant voluntarily removes itself as an applicant, the Commission is relieved of the need to expend resources to further determine the applicant's qualifications, and the petitioner has ensured that a potential wrongdoer is not licensed by the Commission merely because the Commission lacked important information. When weighed against these desirable results, the possibility that an occasional wrongdoer might recover more than its expenses is inconsequential. Moreover, if an applicant that has violated the rules does not settle and ultimately fools the Commission into granting a license, the Commission will have encountered the worst of all worlds -- a tremendous expenditure of resources and the licensing of an unqualified party. By allowing less-than-fair-market-value settlements, the Commission will often be able to eliminate questionable applicants that might otherwise receive licenses.

23. Settlement limits are therefore not the way to improve the efficiency of the petition to deny process. The result of such limits would not only be contrary to the "private attorney general" scheme mandated by the Communications Act, but would likely leave numerous abuses of the cellular lottery process -- particularly those which are most wide-ranging and systematic (and thus expensive to petition against) -- undetected. For these reasons, a blanket rule limiting settling petitioners to

out-of-pocket expenses would not serve the public interest.

24. The incentive for legitimate policing of rule abuses through petitions would be preserved, as would the goal of preventing abusive petitions, by simply prohibiting, on a case-by-case basis, proposed settlements which the Commission finds to involve frivolous petitions to deny. The elements of such a scheme are already in place. The Commission has defined standards for abusive pleadings. In determining whether a petition is "captious or purely obstructive," the Commission considers a number of factors, including "the withholding of information relevant to a determination of the issues raised" and "the absence of any reasonable basis for the allegations raised in the petition to deny." Dubuque T.V. Limited Partnership, 4 FCC Rcd 1999, 2000 (1989).

25. Rather than a blanket limitation on settlement payments that discourages all petitions, no matter how legitimate, the Commission should simply enforce the existing standards on abusive pleadings in the settlement context. AALA proposes that the Commission require that all cellular settlements involving withdrawal of a petition to deny be submitted to the Commission for prior approval. The Commission would then examine the underlying petition and the response(s) thereto, and determine -- under a strict application of its existing standards -- whether the petition is speculative or abusive. This should not be a difficult task.

26. If the Commission determines that a petition fails to meet its standards and is therefore frivolous, the Commission

should reject the proposed settlement, prohibit payment to the petitioner and summarily dismiss the petition to deny. Such an approach would far better serve the public interest, and would better vindicate the policy underlying the statutory petition to deny requirement, than a rule which would create tremendous disincentives for private enforcement of Commission rules.

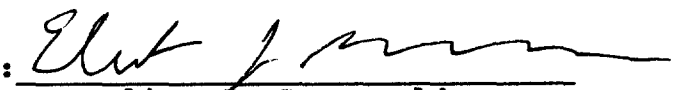
Conclusion

AALA urges the Commission to revise the instructions to the proposed new FCC Form 401 to make clear that applicants must provide the real-party-in-interest exhibit called for by new Section 22.953(a)(5)(v). This will help assure that cellular applications contain sufficient information to enable the detection of potential lottery-skewing schemes, and that applicants are held accountable for any failure to provide this information. In formulating its rules governing applications for unserved areas, the Commission must be careful to retain adequate incentives for private parties to undertake the necessary and often substantial task of assisting the Commission in policing lottery abuses. Furthermore, the Commission's proposed limitation on payments for the withdrawal of petitions to deny and applications would remove the incentive for private parties to undertake the necessary and often substantial task of assisting the Commission in policing lottery abuses. AALA urges

the Commission instead simply to deny payments from those settlements which stem from frivolous petitions.

Respectfully submitted,

APPLICANTS AGAINST LOTTERY ABUSES

By: 
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